

SUPREME COURT OF ARKANSAS

No.

IN RE: ARKANSAS SUPREME COURT
AND COURT OF APPEALS RULES 4-1
AND 4-2

Opinion Delivered 6-4-09

PER CURIAM

Two years ago, this court highlighted problems relating to attorneys' failure to comply with the rules for appellate briefs. *In re Appellate Practice Concerning Defective Briefs*, 369 Ark. App'x 553 (2007). Our warning apparently went unheeded. We continue to have to order rebriefing. In the 2006-07 court term, we ordered rebriefing in eleven cases, in the 2007-08 term, nine, and thus far in the current term, nineteen. In an attempt to aid appellate attorneys, we asked our Committee on Civil Practice to review Supreme Court and Court of Appeals Rule 4-2, which governs the contents of briefs, abstracts and addendums, and to submit a special and expedited report suggesting amendments to the rule.

The Committee has discharged its assignment. We have reviewed the Committee's work and have made some revisions of our own. We now publish the suggested amendments for comment from the Bench and Bar. Proposed changes are set out in "line-in, line-out"

fashion (new material is underlined; deleted material is lined through). We express our gratitude to the Committee for its prompt attention to our request.

We note one of the court's proposed changes to Rule 4-2 is the expansion in subsection (c) of the opportunity to cure deficient briefs and the possible penalties to be imposed against attorneys who fail to avail themselves of this curative opportunity.

In conjunction with these proposed amendments to Rule 4-2, we are also proposing several related changes to Rule 4-1. We have added language in Rule 4-1(e) to clarify that the Supreme Court Clerk's authority to grant a seven-day extension to correct noncomplying briefs is not limited to matters related to abstracts and addendums but applies to any problems that the Clerk discovers at the time of filing. We are also proposing to change the font size for briefs from *12 points to 13 points*.

Comments on the suggested rules changes should be made in writing before August 1, 2009, to: Leslie W. Steen, Clerk, Supreme Court of Arkansas, Attn.: Civil Procedure Rules, Justice Building, 625 Marshall Street, Little Rock, Arkansas 72201.

Rule 4-1. Style of briefs.

(a) *Briefs - Size - Paper - Type.* All briefs shall be type written or produced with computer or word processing equipment. Briefs shall be of uniform size on opaque, unglazed 8 ½" x 11" white paper and firmly bound on the left hand margin by staples or other binding devices. If staples are used, they should be covered by tape. Briefs shall be double-spaced, except for quoted material, which may be single-spaced and indented. Footnote lines, except quotations, shall be double-spaced. Use of footnotes is not encouraged and should be used

sparingly. Carbon copies are not acceptable, but copies produced by offset printing, positive photocopy, or other dry photo-duplicating process which produces a clearly legible black-on-white reproduction may be used. The abstract, statement of the case, argument, and addendum shall each be numbered sequentially from page one, and both sides of the page may be used. The margin at the top, outer edge, and bottom of each page shall be not less than one inch, and the margin at the binding edge shall be wide enough to allow the text to be read easily. The style of print shall be either mono-spaced, measured in characters per inch, not to exceed 10 characters per inch, or produced in a proportional serif font, measured in point sizes, not to be less than ~~12~~ 13 points. Commercial organizations or members of the bar maintaining equipment for duplicating may submit to the Clerk samples for prior approval. If the Clerk is satisfied that such duplicating process will produce documents which conform to the specifications of this Rule, it will be approved.

...

(e) *Noncompliance.* Briefs not in compliance with this rule shall not be accepted by the Clerk. When a party submits a brief on time that substantially complies with the rules, the Clerk may mark the brief “tendered,” grant the party a seven-day compliance extension, and return the brief to the party for correction. If the party resubmits a compliant brief within seven (7) calendar days, then the Clerk shall accept that brief for filing on the date it is received.

Rule 4-2. Contents of Briefs.

(a) *Contents.* The contents of the brief shall be in the following order:

(1) *Table of contents.* Each brief must include a table of contents. It should reference the page number for the beginning of each of the major sections identified in Rule 4-2(a)(2)-(8). ~~The table of contents also should include references to the abstract listing the name of each witness with the page number at which the testimony begins and references to the Addendum listing each document with the page number at which it appears in the Addendum.~~ The table must also list the contents of the abstract and the addendum. The name of each witness, and the abstract page number on which his or her testimony begins, must be included. The table must identify each document in the addendum, list the addendum page number where the document begins, and list the corresponding record page number.

(2) *Informational statement and jurisdictional statement.* The Informational Statement and Jurisdictional Statement required by Supreme Court Rule 1-2(c).

(3) *Points on appeal.* The appellant shall list and separately number, concisely and without argument, the points relied upon for a reversal of the judgment or decree. The appellee ~~will~~ must follow the same sequence and arrangement of points as contained in the appellant's brief and may then state additional points. Either party may insert under any point not more than two citations which ~~either the party~~ the party considers ~~to be~~ the principal authorities on that point.

(4) *Table of authorities.* The table of authorities shall be an alphabetical listing of authorities with a designation of the page number of the brief on which the authority appears. The authorities shall be grouped as follows:

- (A) Cases
- (B) Statutes ~~and~~ and Rules
- (C) Books and ~~T~~treatises
- (D) Miscellaneous

~~(5) *Abstract.* The appellant's abstract or abridgment of the transcript should consist of an impartial condensation, without comment or emphasis, of only such material parts of the testimony of the witnesses and colloquies between the court and counsel and other parties as are necessary to an understanding of all questions presented to the Court for decision. Depositions shall be abstracted in a similar fashion. For ease of abstracting, the court reporter shall provide the attorney, at cost, not to exceed five (5) dollars, a copy of the transcript in an electronic form, e.g., a computer diskette, so that material may be electronically copied and placed in the abstract. (If the court reporter does not have the requisite equipment, then this requirement shall not apply.) Pleadings and documentary evidence should not be abstracted. On a second or subsequent appeal, the abstract shall include a condensation of all pertinent portions of the transcript filed on any prior appeal. Not more than one page of the transcript shall in any instance be abstracted without a page reference to the transcript. In the abstracting of testimony, the first person (i.e., "I") rather than the third person (i.e., "He, She") shall be used. The Clerk will refuse to accept a brief if the testimony is not abstracted in the first person or if the abstract does not contain the required references to the record. Whenever a map, plat, photograph, or other similar exhibit must be examined for a clear understanding of the testimony, the appellant shall reproduce the exhibit by photography or other process and include it in the Addendum with a reference in the abstract to the page in the Addendum where the exhibit appears unless this requirement is shown to be impracticable and is waived by the Court upon motion.~~

[New]

(5) *Abstract.* The appellant shall create an abstract of the material parts of all the transcripts (stenographically reported material) in the record. Information in a transcript is material if the information is essential for the appellate court to confirm its jurisdiction, to understand the case, and to decide the issues on appeal.

(A) Contents. All material information recorded in a transcript (stenographically reported material) must be abstracted. Depending on the issues on appeal, material information may be found in, for example, counsel's statements and arguments, voir dire, testimony, objections, admissions of evidence, proffers, colloquies between the court and counsel, jury instructions (if transcribed), and rulings. All material parts of all hearing transcripts, trial transcripts, and deposition transcripts must be abstracted, even if they are an exhibit to a motion or other paper. Exhibits (other than transcripts) shall not be abstracted. Instead, material exhibits shall be copied and placed in the addendum. If an exhibit referred to in the abstract is in the addendum, then the abstract shall include a reference to the addendum page where the exhibit appears.

(B) Form. The abstract shall be an impartial condensation, without comment or emphasis, of the transcript (stenographically reported material). The abstract must not reproduce the transcript verbatim. No more than one page of a transcript shall be abstracted without giving a record page reference. In abstracting testimony, the first person ("I") rather than the third person ("He or She") shall be used. The question-and-answer format shall not be used. In the extraordinary situations where a short exchange cannot be converted to a first-person narrative without losing important meaning, however, the abstract may include brief quotations from the transcript.

(C) Miscellaneous. (i) In a second or subsequent appeal, material information from all transcripts filed in any prior appeal must be abstracted. (ii) If an abstract exceeds two hundred fifty pages, then the appellant may move the court for permission to bind the abstract separately from the other parts of the brief. (iii) To assist in the abstracting process, the court reporter shall provide the appellant at a nominal charge an electronic copy of the transcript. ~~at a cost of no more than \$5.00.~~ (iv) The Clerk will refuse to accept a brief if the abstract

does not comply with this rule. As prescribed by Rule 4-1(d), the abstract must also comply with Administrative Order 19's redaction requirements for confidential information.

(6) *Statement of the Case.* The appellant's brief shall contain a concise statement of the case without argument. This statement ~~shall be denoted as the "Statement of the Case,"~~ shall ordinarily not exceed two pages in length, and shall not exceed five pages without leave of the court. The pages of the statement of the case shall appear immediately ~~preceding~~ before the argument and are not counted against the page limits of the Argument set out in Rules 4-1(b) and 4-3(e). The statement of the case should be sufficient to enable the court to understand the nature of the case, the general fact situation, and the action taken by the trial court~~;~~. ~~and~~ The statement must include supporting page references to the abstract ~~or~~ and ~~Addendum or both.~~ The Clerk will refuse to accept a brief if the required references to the abstract ~~and~~ or ~~Addendum~~ are not included. The appellee's brief need not contain a statement of the case unless the appellant's statement is deemed to be controverted or insufficient.

(7) *Argument.* Arguments shall be presented under subheadings numbered to correspond to the outline of points to be relied upon. For each issue, the applicable standard of review shall be concisely stated at the beginning of the discussion of the issue. Citations of decisions of the Arkansas Supreme Court and Court of Appeals ~~which are officially reported~~ must be from the official reports, and all citations to both official and unofficial reports shall follow the format prescribed in Rule 5-2. All citations of decisions of any other court must state the style of the case ~~and the book and page~~ and cite the official reporter (including a regional reporter so designated by the issuing court) in which the case is found. If the case is also reported by ~~one or more~~ unofficial publishers, including an unofficial electronic database, one ~~of these~~ should also be cited; ~~if possible.~~ Reference in the argument portion of the parties' briefs to material found in the abstract and ~~Addendum~~ shall be followed by a reference to the

page number of the abstract or ~~Addendum~~ at which such material may be found. The number of pages for argument shall comply with Rule 4-1(b).

~~(8) Addendum.~~ Following the signature and certificate of service, the appellant's brief shall contain an Addendum which shall include true and legible photocopies of the order, judgment, decree, ruling, letter opinion, or Workers' Compensation Commission opinion from which the appeal is taken, along with any other relevant pleadings, documents, or exhibits essential to an understanding of the case and the Court's jurisdiction on appeal. In the case of lengthy pleadings or documents, only relevant excerpts in context need to be included in the Addendum. Depending upon the issues on appeal, the Addendum may include such materials as the following: a contract, will, lease, or any other document; proffers of evidence; jury instructions or proffered jury instructions; the court's findings and conclusions of law; orders; administrative law judge's opinion; discovery documents; requests for admissions; and relevant pleadings or documents essential to an understanding of the Court's jurisdiction on appeal such as the notice of appeal. The Addendum shall include an index of its contents and shall also be clear where any item appearing in the Addendum can be found in the record. The appellee may prepare a supplemental Addendum if material on which the appellee relies is not in the appellant's Addendum. Pursuant to subsection (c) below, the Clerk will refuse to accept an appellant's brief if its Addendum does not contain the required order, judgment, decree, ruling, letter opinion, or administrative law judge's opinion. The appellee's brief shall only contain an Addendum to include an item which the appellant's Addendum fails to include.

[New]

(8) Addendum. The appellant's brief shall contain an addendum after the signature and certificate of service. The addendum shall contain true and legible copies of the non-

transcript documents in the record on appeal that are essential for the appellate court to confirm its jurisdiction, to understand the case, and to decide the issues on appeal. The addendum shall not merely reproduce the entire record of trial court filings, nor shall it contain any document or material that is not in the record.

(A) Contents.

(i) The addendum must include the following documents:

- the pleadings (as defined by Rule of Civil Procedure 7(a)) on which the circuit court decided each issue: complaint, answer, counterclaim, reply to counterclaim, cross-claim, answer to cross-claim, third-party complaint, and answer to third-party complaint. If any pleading was amended, the final version and any earlier version incorporated therein shall be included;
- all motions (including posttrial and postjudgment motions), responses, replies, exhibits, and related briefs, concerning the order, judgment, or ruling challenged on appeal. But if a transcript (stenographically reported material) of a hearing, deposition, or testimony is an exhibit to a motion or related paper, then the material parts of the transcript shall be abstracted, not included in the addendum. The addendum shall also contain a reference to the abstract pages where the transcript exhibit appears as abstracted;
- any document essential to an understanding of the case and the issues on appeal, such as a will, contract, lease, note, insurance policy, trust, or other writing;
- in a case where there was a jury trial, the jury's verdict forms;

- in a case where there was a bench trial, the court's findings of fact and conclusions of law, if any;

- the order, judgment, decree, ruling, letter opinion, or administrative agency decision from which the appeal is taken. If the order (however named) incorporates a bench ruling, then that ruling must be abstracted and the addendum must contain a reference to the abstract pages where the information appears as abstracted. The transcript (stenographically reported material) containing the ruling may also be copied in the addendum or omitted, at the appellant's choice;

- all versions of the order (however named) being challenged on appeal if the court amended the order;

- any order adjudicating any claim against any party with or without prejudice;

- any Rule of Civil Procedure 54(b) certificate making an otherwise interlocutory order a final judgment;

- all notices of appeal;

- any postjudgment motion that may have tolled the time for appeal, and is therefore necessary to decide whether a notice of appeal was timely filed;

- any motion to extend the time to file the record on appeal, and any related response, reply, or exhibit;

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- any order extending the time to file the record on appeal; and
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- any other pleading or document in the record that is essential for the appellate court to confirm its jurisdiction, to understand the case, and to decide the issues on appeal. For example, docket sheets, superseded pleadings, discovery-related documents, proffers of documentary evidence, jury instructions given or proffered, and exhibits (such as maps, plats, photographs, computer disks, CDs, DVDs).

(ii) *Waiver of addendum obligation.* If an exhibit or other item in the record cannot be reproduced in the addendum, then the party making the addendum must file a motion seeking a waiver of the addendum obligation.

(B) *Form.* Each page in the addendum must also show the record page number where the original is located. Each document must be a complete and legible copy of the original, clearly showing any file mark. If an addendum exceeds two hundred fifty pages, then a party may bind it separately from the rest of the brief without filing a motion seeking permission from the appellate court to do so.

(C) *Supplemental addendum.* An appellee may include a supplemental addendum containing any document in the record on which the appellee relies in its brief and that is absent from the appellant's addendum. A cross-appellant shall likewise limit any supplemental addendum to documents of record not contained in the appellant's addendum but necessary to demonstrate appellate jurisdiction over, and to decide the issues in, the cross-appeal. A cross-appellee may include a non-duplicative supplemental addendum limited to documents concerning the cross-appeal.

(D) *Miscellaneous*. If the Clerk determines that the addendum does not comply with this rule, he or she shall refuse to accept a brief. As prescribed by Rule 4-1(d), the addendum must also comply with Administrative Order 19's redaction requirements for confidential information.

(9) *Cover for briefs*. On the cover of every brief there should appear the number and style of the case in the Supreme Court or Court of Appeals, a designation of the court from which the appeal is taken, and the name of its presiding judge, the title of the brief (e.g., "Abstract, Addendum, and Brief for Appellant"), and the name or names of individual counsel who prepared the brief, including their addresses, telephone and facsimile numbers, and e-mail addresses.

(b) *Insufficiency of appellant's abstract or ~~A~~addendum*. Motions to dismiss the appeal for insufficiency of the appellant's abstract or ~~A~~addendum will not be recognized. Deficiencies in the appellant's abstract or ~~A~~addendum will ordinarily come to the court's attention and be handled in one of three ways as follows:

(1) If the appellee considers the appellant's abstract or ~~A~~addendum to be defective, the appellee's brief should call the deficiencies to the court's attention and may, at the appellee's option, contain a supplemental abstract or ~~A~~addendum. When the case is considered on its merits, the court may upon motion impose or withhold costs, including attorney's fees, to compensate either party for the other party's noncompliance with this rule. In seeking an award of costs under this paragraph, counsel must submit a statement showing the cost of the supplemental abstract or ~~A~~addendum and a certificate of counsel showing the amount of time that was devoted to the preparation of the supplemental abstract or ~~A~~addendum.

(2) If the case has not yet been submitted to the court for decision, an appellant may file a motion to supplement the abstract or ~~A~~addendum and file a substituted brief. Subject to the court's discretion, the court will routinely grant such a motion and give the appellant fifteen days within which to file the substituted abstract, ~~A~~addendum, and brief. If the appellee has already filed its brief, upon the filing of appellant's substituted abstract, ~~A~~addendum, and brief, the appellee will be afforded an opportunity to revise or supplement its brief, at the expense of the appellant or the appellant's counsel, as the court may, upon motion, direct.

(3) Whether or not the appellee has called attention to deficiencies in the appellant's abstract or ~~A~~addendum, the court may address the question at any time. If the court finds the abstract or ~~A~~addendum to be deficient such that the court cannot reach the merits of the case, or such as to cause an unreasonable or unjust delay in the disposition of the appeal, the court ~~will~~ may notify the appellant that he or she will be afforded an opportunity to cure any deficiencies, and has fifteen days within which to file a substituted abstract, ~~A~~addendum, and brief, at his or her own expense, to conform to Rule 4-2 (a)(5) and (8). Mere modifications of the original brief by the appellant, as by interlineation, will not be accepted by the Clerk. Upon the filing of such a substituted brief by the appellant, the appellee will be afforded an opportunity to revise or supplement the brief, at the expense of the appellant or the appellant's counsel, as the court may direct. If after the opportunity to cure the deficiencies, the appellant fails to file a complying abstract, ~~A~~addendum and brief within the prescribed time, the judgment or decree may be affirmed for noncompliance with the rule.

(4) When an abstract or addendum is insufficient, the appellate court shall not go to the record to affirm or reverse the trial court's decision.

(c) *Noncompliance.* (1) Briefs not in compliance with the format required in Rules 4-1 and 4-2 shall not be accepted for filing by the Clerk. When a party submits a noncompliant brief on

time that substantially complies with ~~the these~~ Rules governing briefs, the Clerk shall mark the brief “tendered,” grant the party a seven-day compliance extension, and return the brief to the party for correction. If the party resubmits a compliant brief within seven (7) calendar days, then the Clerk shall accept that brief for filing on the date it is received.

(2) If after a brief has been accepted for filing, it is determined that an appellee’s brief is deficient or an appellant’s brief is deficient in areas not addressed in Rule 4-2(b)(3), the court may give the party fifteen days to cure the noncompliance under the procedure described in Rule 4-2 (b)(3). If the problem is not timely corrected, then the court will take appropriate action, including affirming the judgment or decree at cost to the appellant, or otherwise giving judgment according to the requirements of the case.

(3) After the opportunity to cure deficiencies has been afforded pursuant to Rule 4-2(b)(3) or (c)(2), attorneys who fail to comply with the requirements of this rule shall be referred to the Office of Professional Conduct, and in addition, may be subject to any of the following: (A) contempt, (B) suspension of the privilege to practice before the Supreme Court or Court of Appeals for a specified time or until the attorney can demonstrate a satisfactory competency of the rules, or (C) imposition of any of the sanctions listed in Rule 11(c) of the Rules of Appellate Procedure-Civil.